

FILED BY CLERK

OCT 19 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0196-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LARRY DONNELL DUNLAP,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR52543

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Larry Donnell Dunlap

Florence
In Propria Persona

B R A M M E R, Judge.

¶1 Based on acts he committed in 1995, petitioner Larry Dunlap was convicted after a jury trial of one count of sexual abuse and five counts of child molestation. He has had two direct appeals, resulting in a resentencing, *State v. Dunlap*, No. 2 CA-CR 96-

0643 (memorandum decision filed Apr. 21, 1998), and a modification of his sentence upon resentencing, *State v. Dunlap*, No. 2 CA-CR 99-0084 (memorandum decision filed Mar. 30, 2000). Before seeking post-conviction relief in this proceeding, it appears Dunlap twice sought relief pursuant to Rule 32, Ariz. R. Crim. P., and that this court denied relief on review from the trial court's orders denying those petitions. *See State v. Dunlap*, No. 2 CA-CR 2004-0276-PR (decision order filed Feb. 11, 2005) (seeking sentencing relief based on *Blakely v. Washington*, 542 U.S. 296 (2004)); *State v. Dunlap*, No. 2 CA-CR 2002-0215-PR (memorandum decision filed Sept. 11, 2003) (challenging designation of certain offenses as dangerous crimes against children). Dunlap now challenges the trial court's orders dismissing his third notice of post-conviction relief and denying his motion for rehearing. We will not disturb the court's rulings unless it clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 To address Dunlap's petition for review, we review the procedural history of this post-conviction proceeding. Dunlap filed his third notice of post-conviction relief in December 2010, checking the spaces on the form notice to reflect his intent to raise claims of newly discovered evidence, significant change in the law, ineffective assistance of counsel, actual innocence. *See* Ariz. R. Crim. P. 32.1(e), (g), (h). In the same document, Dunlap summarized the gist of all but the claim of ineffective assistance of counsel. He asserted (1) he had discovered witnesses who could support an alibi defense, stating he had not been with the three victims on the date and at the time of the offenses; (2) one of the victims, J., wished to recant the allegations; and, (3) a witness would testify

that one victim, P., had told another victim, M., to falsely accuse Dunlap of having molested him in order to retaliate against Dunlap for having failed to repay a debt to P. In its December 16, 2010 ruling, the trial court identified these claims and, quoting Rule 32.2(b), stated that Dunlap had not ““set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition.”” The court then rejected the claim Dunlap raised pursuant to Rule 32.1(h), finding the evidence of his purported innocence was not clear and convincing, nor had he cited a significant change in the law, thereby failing to present a claim under Rule 32.1(g).

¶3 Although the trial court also rejected some of Dunlap’s newly-discovered-evidence claims, it found the claims that victim J. was recanting and P. had conspired to falsely accuse him “may amount to newly discovered material facts, but the court does not have the information necessary to make that determination.” Specifically, the court stated it could not determine whether Dunlap had exercised due diligence in securing the facts. The court ordered Dunlap to file, “on or before January 17, 2011,” a supplement to the notice setting forth “the dates and circumstances of when he first learned of these allegations and all facts from which the court might determine that the petitioner exercised due diligence in securing the newly discovered evidence.” The court further ordered that “[i]f the petitioner fails to file such supplement by that date, or if the supplement does not contain facts from which the court can conclude that the petitioner exercised due diligence in discover[ing] the newly discovered evidence, the petition will be dismissed.”

¶4 Dunlap subsequently filed three motions for orders of discovery. Relying on *Canion v. Cole*, 210 Ariz. 598, 115 P.3d 1261 (2005), the trial court denied the motions in its December 23 minute entry, characterizing them as “premature” and adding that it could only grant Dunlap’s requests for disclosure “once the petition has been filed.” The court stated it was “awaiting the . . . supplement” it had directed Dunlap to file “before the court can determine whether the petition presents meritorious reasons for not raising claims in earlier petitions.” Dunlap filed a motion requesting a hearing and the appointment of counsel, and a fourth motion seeking discovery. On January 3, 2011, the court denied the additional request for discovery “[f]or the reasons articulated in the court’s order of December 23.” Dunlap then filed a motion for reconsideration of the court’s earlier dismissal of some of the claims he had raised in the notice of post-conviction relief.

¶5 The trial court denied the motion for reconsideration, specifying why the claim that Dunlap had not been with the victims at the time of the offenses was not “newly discovered material facts” for purposes of Rule 32.1(e). The court concluded that this was not a claim that fell within Rule 32.1(e), nor was Dunlap’s claim that the “daily planners” he had discovered were new evidence under the rule. The court reiterated it was waiting for the supplement it had directed Dunlap to file in its December 16 minute entry.

¶6 On January 11, 2011, Dunlap filed the supplement. In its January 24 minute entry, the trial court found Dunlap had not raised a claim that could be characterized as a claim of newly discovered evidence with respect to victim P. having

allegedly conspired to falsely accuse him. It concluded, however, the claim relating to J.'s recantation should not be precluded and ordered Dunlap to file a petition on or before March 28, 2011. Thereafter, Dunlap filed two motions seeking the appointment of counsel. The court denied the motions, noting they were actually the same motion and acknowledging Dunlap was not entitled to the appointment of counsel on a successive notice.

¶7 On March 30, 2011, Dunlap filed a motion to stay the Rule 32 proceeding, including the March 28 deadline the trial court previously had set for filing the petition on the non-precluded claim, so that he could file a petition for special action relief in this court. He also filed a separate motion to extend the time for filing the petition. In its minute entry dated April 1, the court pointed out Dunlap had filed the motions on March 30 and that the petition had been due on March 28. The court stated that from the information before it, it did not appear Dunlap had filed a special action petition. For that reason, the court denied the motion for stay, assuring Dunlap he could renew the motion once he filed the special action petition. But the court did give Dunlap more time to file the petition, setting a new deadline of April 18, 2011. Shortly thereafter, Dunlap filed a second motion for stay, stating he had filed a special action petition in the court of appeals. In its order dated April 22, the court denied that motion, again finding Dunlap had not filed a special action petition.

¶8 In its order dated May 2, the trial court dismissed Dunlap's notice because he had failed to file the Rule 32 petition by the April deadline after having been given the extension. The court mistakenly stated in that minute entry the deadline it had previously

imposed was April 28, not April 18, which was the date the court plainly had set in the minute entry dated April 1. Dunlap filed a motion for reconsideration, which the court denied. The court reiterated that Dunlap had failed to file the Rule 32 petition by the April deadline it had imposed, this time correctly identifying that deadline as April 18. The court added, “The Petitioner claims that he should have been granted an extension because he filed a special action in the Division Two Court of Appeals and therefore his Rule 32 proceedings in this court should have been stayed.” As the court noted, Dunlap asked the court to reconsider its May 2, 2011 ruling on the ground that “the court had not received documentation from the Court of Appeals showing that it was reviewing the Petitioner’s special action.” But, the court added, “although the Petitioner did file a special action, it was not filed with the Court of Appeals until April 21, 2011, which was after the Petitioner’s Rule 32 deadline in this court.”

¶9 In his petition for review, Dunlap challenges the trial court’s May 2 order dismissing the notice of post-conviction relief and the June 3 order denying his motion for rehearing of the May 2 ruling. He contends the court had imposed two deadlines, April 18 and April 28. He argues that he “filed his special action petition on April 15[,] 2011 and the court of appeals filed [his] petition on April 21, 2011 . . . well under the April 28, 2011 court ordered deadline in this case.” He also describes his extensive investigative efforts to gather evidence that would have established the victims had recanted their claims that he had molested them.

¶10 The trial court did not abuse its discretion by dismissing the notice. As we noted above, the court identified the claims that were not subject to immediate dismissal

and ordered Dunlap to file the petition by March 28. When Dunlap failed to file the petition by that date, instead of dismissing the notice the court gave Dunlap additional time, ordering him to file the petition by April 18. As we stated above, the court's May 2 minute entry is incorrect; the court found Dunlap had failed to file the petition by April 28 when the deadline was actually April 18. That did not, however, as Dunlap contends, create two deadlines. Nor could Dunlap have been affected by the erroneous reference to April 28, given that the error was made in an order entered on May 2, almost two weeks after the deadline already had passed.

¶11 That Dunlap filed a petition for special action relief in this court does not mean the trial court abused its discretion by dismissing the notice of post-conviction relief on May 2 and subsequently denying the motion for reconsideration. The court's rulings suggested it might have considered extending the deadline for filing the Rule 32 petition if Dunlap established he had filed a special action petition. But, as the court pointed out when it denied the motion for rehearing on June 3, Dunlap had filed the special action petition on April 21, which was after the April 18 deadline had passed.

¶12 In addition, the mere filing of the special action petition did not stay automatically the Rule 32 proceeding; in the absence of an express stay order from this court or the trial court, the Rule 32 proceeding would continue, with all deadlines applying. *See* Ariz. R. P. Spec. Actions 5. Neither before nor after April 18 did we issue any such order in Dunlap's special action proceeding. And we declined to accept special action jurisdiction on May 2.

¶13 Finally, that Dunlap may have discovered evidence to present in support of his claim is of no moment. He was required to put that information in a timely filed petition. He failed to do so, despite having been given two extensions.

¶14 Although we grant the petition for review, for the reasons stated above, we deny Dunlap's request for relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge